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In the United States Court of Appeals for the Fifth Circuit

No. 13444

SOUTHERN FURNITURE MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Southern Furniture Manufacturing Company, herein referred to as the Company, to review and set aside an order issued by the National Labor Relations Board on October 23, 1950 (91 N. L. R. B. No. 189, R. 102–163)[1] after the usual proceedings under Section 10 (c) of the National Labor Relations Act, as

[1] References to the pleadings, Decision and Order of the Board, etc., printed pursuant to Rule 38 of this Court as Volume I, Transcript of Record, are designated "R"; references to portions of the testimony and documentary exhibits, printed by the petitioner in its appendix to its brief are designated by the symbol "P. A." References to the Board's appendix, bound together with this brief, are designated "B. A."

amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, *et seq.*).[2] The Board in its answer to the petition requested enforcement of its order (R. 36–44). This Court has jurisdiction of the proceeding under Section 10 (e) and (f) of the Act, as amended, the unfair labor practices having occurred at the Company's plant at Navco, Alabama, within this judicial circuit.[3]

I

THE BOARD'S FINDINGS OF FACT

In sum, the Board found that the Company had interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act by questioning employees concerning their union sympathies and threatening an employee concerning the adverse consequences of the unionization of the plant. The Board further found that the Company had discriminatorily discharged 17 employees on October 7, 1949, thereby violating Section 8 (a) (3) of the Act. The subsidiary facts found by the Board and shown by the evidence may be summarized as follows:

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[2] The charges upon which the complaint herein was predicated (R. 45–48, 51–55), alleging the discriminatory discharge of some 33 employees, were filed by Ezeakiel Caldwell, one of the discharged employees. The Company contends, for various reasons detailed at p. 24, *infra*, that Caldwell was not qualified to file the charge on behalf of anyone other than himself. We discuss this contention hereinafter under Point III of the Argument.

[3] The Company, a Mississippi corporation, maintains its principal office and place of business at Navco, Alabama, where it is engaged in the manufacture and assembly of furniture and other wood products (R. 116–117; R. 56–57, 66, P. A. 1). No jurisdictional issue is presented, as the company concedes that it is engaged in commerce within the meaning of the Act (R. 117; R. 66).

A. The Union commences organization of the Company's employees

The Company started its manufacturing operations in Navco, Alabama, in July 1949 (R. 118; P. A. 327). From a force of 8, the number of employees, exclusive of officials, foremen, and members of the office staff, increased to 113 by the week ending October 8, 1949 [4] and, at the time of the hearing in March 1950, to 200 or 210 (R. 118; P. A. 280, 317, B. A. 47). The employees, working in small operational groups under individual foremen, performed tasks, which, though not highly skilled, require care, patience and manual aptitude (R. 120; P. A. 335).

On October 3, Fred C. Deloach, representative for United Construction Workers, affiliated with United Mine Workers, hereinafter referred to as the Union, went to the plant in an attempt to organize the Company's employees, and talked to two or three employees in the vicinity of the clockhouse (R. 120; P. A. 2–3, 8–9). These employees expressed interest in organization and, at the request of one of the men, Willie Johnson, Deloach visited him at his home (R. 120; P. A. 3, 16–17). The following day, October 4, Deloach talked to some men at the Company's commissary, and was informed that while there was interest in the formation of a union, it would be inadvisable for him to carry on activities in the vicinity of the plant (R. 120; P. A. 4–5, 147–148). On October 5, he became acquainted with Ernest Hines, who had worked for the Company until early October

[4] All dates referred to herein are to the year 1949 unless otherwise indicated.

and operated his own bus, transporting various employees back and forth from the Company's plant (R. 120; P. A. 5–6, 20–21).[5] During their October 5, conversation, Deloach and Hines arranged a meeting for the following day so that Deloach might speak to the employees who rode Hines' bus (R. 120–121; P. A. 5–6, 22–23, 33–35).

On October 6, as arranged the previous day, Hines, after certain non-employees had left the bus, stopped the bus load of employees returning home from work at Fulton Road and Highway 90 at a point about 2 to 2½ miles from the company's plant (R. 121; P. A. 7, 23–25, 30, 34, 151). The stopped bus could be observed from the Highway (R. 121; P. A. 66). Union Representative Deloach boarded the bus, introduced himself and, after making some remarks about unionization, asked the employees to indicate their interest by a raise of hands (R. 121; P. A. 6, 25, 44, 58–59, 70, 78–79). When the employees manifested their interest, Union application cards were passed around, with the suggestion that they be taken home, signed, and returned to Hines the next morning (R. 121; P. A. 6–7, 25–26, 45, 59, 70, 78–79, 93–94, B. A. 44). The following morning, October 7, Deloach picked up from Hines about 19 signed cards, which had been turned in by employees (R. 121; P. A.

[5] Hines carried an average of 28 to 30 regular passengers, all but 4 to 6 of whom worked for the company (R. 120; P. A. 21–22, 29–30). Hines usually parked his bus near the office in a parking area right in front of the plant, used by company employees and officials, and the employees who rode the bus normally ate lunch together on the bus (R. 119, 120, 128–129; P. A. 29, 147, 336, B. A. 33).

7, 26–27, 38–39, B. A. 34). All of these cards, and some others turned in later, were delivered to the Union by Representative Deloach (R. 121; P. A. 8, 11, 27).

B. The Company's supervisors question employees about the organizational activity

Early in the morning of October 7, following the bus incident of the evening before, Foreman Bradshaw approached Employee Alston and asked her if she rode the bus and if she had received a Union card and signed it (R. 131, 133; P. A. 181–182). When Alston denied signing a Union card, Bradshaw commented, "Well, and you ride the bus and didn't sign a card?" (*ibid.*). A short while later, Foreman Bradshaw returned, called Ezeakiel Caldwell aside, and asked him if anyone had stopped him going to and from work (R. 131; P. A. 182–183). When, after repeated inquiries, Caldwell denied signing a Union card, Bradshaw warned, "Well, somebody is messing with the labor around here and if I finds out who it is, it won't be so good for them" (R. 103, 131; P. A. 183).

Later that morning, Foreman Dean Thomas asked Employee Jessie Sullivan in what she rode to work. When she told him that she rode the bus, he asked her if she signed a Union card (R. 123–124; P. A. 46–47, 60). Upon her admission that she had done so, he asked who else rode the bus. She pointed to Employees Flossie Mae Carroll and Delores Caldwell (R. 123–124; P. A. 46–47, 60–61), but when Thomas pressed for further information concerning those riding the bus, she replied that she did not know them

all (R. 123; P. A. 47). Thomas then asked Sullivan for her clock number and, receiving it, left (*ibid.*).

Foreman Thomas continued systematically interrogating the employees in an effort to learn the names and clock numbers of those who had ridden Hines' bus the night before, questioning employees Carroll, Delores Caldwell, Williams, Jackson, and Annie Lee Caldwell concerning these matters (R. 124, 126, 133; P. A. 61–62, 94–95, 142, 154–156, 346–347). When Williams, in response to Thomas' direct question, denied that she signed a Union card, Thomas cautioned her, "Don't tell me no story" (R. 126, 133; P. A. 94–95). In the course of his questioning of Annie Lee Caldwell, Thomas ascertained that although she usually rode with her father, Ezeakiel Caldwell, she had ridden the Hines bus the evening before (R. 130; P. A. 96, 154, 156).

Meanwhile, Foremen Sledge and Bradshaw were also interrogating employees under their supervision. Foreman Sledge asked Employee Howard if she rode on the bus and, when Howard answered in the affirmative, asked for her clock number (R. 132; P. A. 272–273). At about eleven o'clock that morning, Foreman Bradshaw approached Employee Leona Steele and queried her concerning whether she had been on the bus the evening before (R. 128; P. A. 131–132). Steele admitted that she had, whereupon Bradshaw asked her if a Union man had boarded the bus and distributed Union cards (R. 128; P. A. 132). When Steele denied this, Bradshaw commented, "Don't tell me a lie," and walked off (*ibid.*). Shortly thereafter, Foreman Bradshaw returned and inquired if she was

sure she "didn't take," "didn't sign," or "didn't see anybody take," a Union card (*ibid.*). Steele answered no, fearing she would be fired if she told the truth (R. 128; P. A. 132, 136–137). Bradshaw then asked her for her clock number and marked it down (R. 128; P. A. 132).

C. The Company summarily discharges the Union adherents

The afternoon of October 7, following this extensive interrogation of the employees, the company discharged 17 employees. Fifteen of the 17 employees with whom we are here concerned were given their final pay slips and notified that they were being laid off shortly after 4 p. m. (R. 103–104, 121–133; P. A. 48–50, 61–62, 72, 74–75, 95, 106–107, 132–133, 142, 155, 174, 183–184, 273–274, 347–348, B. A. 37–38, 39–40, 41, 45–46). The other two employees, Creola Law and Mary Lee Williams, were notified of their discharge as they entered the plant on the next workday, Monday, October 10 (R. 125, 127; P. A. 80–81, 117–118). All of the discharged employees, except Ezeakiel Caldwell and Lillian Warmack, rode the Hines bus on October 6[6] (R. 103, 121; P. A. 44, 58, 69, 78, 93, 104, 116, 131, 141, 147, 153, 171–172, 271, 345, B. A. 44). Ezeakiel and Lillian normally came to work, together with Annie Lee Caldwell, in Ezeakiel's

[6] Two other employees who rode the bus on October 6, Benniefield and Frieson, who were absent the first part of the following week, were notified upon their return that all employees who had not appeared for work on Monday or Wednesday had been terminated (R. 104, 125, 127; P. A. 86–88, 113–114, 123–124). Three employees (Morgan, "Geneva," and William Martin) who rode the bus were not laid off or discharged (R. 104; P. A. 63–64, 223–224).

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truck (R. 131; P. A. 152, 171–172, 179). Lillian Warmack was known to be the sister of Ezeakiel Caldwell, who in turn was known to be the father of Annie Lee Caldwell and the father-in-law of Delores Caldwell, both of whom had admitted to Foreman Thomas that they had ridden the bus on October 6 (R. 130–131, 133, 145; P. A. 96, 154, 156, 172–173, 178–179, 306, 346). Employee Warmack signed a Union card in the company plant at noon October 7 (R. 130–131, P. A. 173–174, B. A. 40). All of the discharged employees, with the possible exception of Minnie Lee Alston,[7] received and signed Union application cards (R. 103; P. A. 45–46, 59, 70, 79, 97–98, 104–105, 116, 131, 141, 149, 153, 173–174, 179–180, 272, 345–346, B. A. 38–39, 40, 45). While most of the discharged employees turned in their signed cards the morning of October 7, Ezeakiel Caldwell did not deliver his to Bus Driver Hines until the afternoon of October 7, after his discharge (R. 121–133; P. A. 179–180).

D. The Company's explanation for the discharges and the inconsistent statements made by the Company foremen at the time of discharge

At the hearing, the Company asserted that Ezeakiel Caldwell had been discharged because one of its foremen had heard that he was discussing the possibility of obtaining employment with another person, and that the others had been discharged pursuant to orders

[7] The deposition of employee Alston could not be obtained within the time set by the Trial Examiner (R. 115). Although the record, therefore, does not affirmatively show that Alston signed a card, it is clear that she was interrogated and suspected of Union activity (R. 103; P. A. 181–182).

from the Company's president to weed out inefficient workers in furtherance of a process of building up a capable working force from a group of inexperienced employees.

At the time of the discharge, however, most of the employees were told that they were being laid off for a week or two and that they would be sent for when needed (R. 123–133, 140, 152; P. A. 50–51, 62, 74–75, 95, 133, 155, 175, 347, B. A. 37). Though the working force was gradually increased to almost double the October 8 level, through the hiring of as many as 30 employees a week, these dischargees were not reinstated (P. A. 280, 317, B. A. 47). On the whole, the discharged employees had never been given any instructions by their foremen and relied upon fellow employees for instructions in their work (R. 122–133, 136; P. A. 41, 57, 76–77, 92–93, 115–116, 130, 152, 178, 270, 344). None of the 17, except Delores Caldwell, who was once corrected for the way she piled drawers she had glued, was ever criticized and none was forewarned (R. 103–104, 122–133; P. A. 43, 57, 69, 77, 93, 102, 116, 131, 141, 152, 270, 344, B. A. 41, 43). The only mention of unsatisfactory work, at the time of discharge, was to Rosie Lee Campbell, who, only after asking why she was being laid off, was told "I don't have no reason other than your work's not satisfactory and I don't need you Monday" (R. 126; P. A. 106–107). Campbell was rehired March 2, 1950 (R. 126, 144; P. A. 100).

With respect to the Company's contention that Ezeakiel Caldwell was discharged because it had heard that he was interested in employment else-

where, the background facts are these: Caldwell was employed when Foreman Bradshaw found he was an experienced upholsterer (R. 131; P. A. 175–177). Caldwell and his sister, Lillian C. Warmack, worked together doing upholstery work and Bradshaw had had them do some private work for him in his home (R. 130–131, 147; P. A. 172–173, 175–177, 302). The day after this work was completed, Foreman Bradshaw hired Warmack and told her "Lillian, you have a job as long as you want it here in the plant" (R. 130; P. A. 173, 176).

During the course of his employment, Ezeakiel Caldwell was recommended by Bradshaw to a Mr. Gralapp, who ran a furniture shop and was looking for someone to do some part-time upholstery and repair work for him (R. 132, 137; P. A. 188–189, 257–258, 259, 263, 302). Foreman Bradshaw asked Caldwell if he would be interested in an upholstery shop and Caldwell told him no, because there were not enough people willing to pay for that type of work (P. A. 187). Caldwell, however, met Gralapp and agreed to do some part-time work for him (R. 132; P. A. 186, 188–189, 258). He took a studio couch to his home a day or two before his discharge, upholstered and returned it, and was paid for the work on October 12 (R. 132; P. A. 189, 259–260). Gralapp, who did not want to cause friction or interfere with the company work since the work Caldwell was to do for him was "strictly a part-time job," told Foreman Bradshaw that he was going to give Caldwell some part-time work (P. A. 263–264, 305). Caldwell told Bradshaw that he was doing a job for Gralapp

and that he needed more money (R. 137; P. A. 296, 302–303). Bradshaw promised him a raise, and Caldwell's last pay slip showed an increase in rate from 40 to 45 cents an hour (R. 137; P. A. 184–185). When Caldwell was discharged on October 7, he was merely told, "Well, Deacon, we got to lay off some and I guess I just as well start on you," no mention being made of the possibility of his leaving to work for someone else (R. 132, 145; P. A. 184, 186, 193–194).

II

The Board's conclusions

On the basis of the foregoing facts the Board concluded that Foreman Bradshaw's warning to Ezeakiel Caldwell and the extensive interrogation of employees concerning Union activities engaged in by Bradshaw and other foremen constituted interference, restraint and coercion in violation of Section 8 (a) (1) of the Act (R. 103).

The Board further concluded (R. 103–104) that the abrupt discharge without warning of the 17 employees here involved immediately after their interest in the Union became known to the Company, was motivated by its opposition to the unionization of the plant, and was therefore violative of Section 8 (a) (3) of the Act. In so finding, the Board rejected as an afterthought and pretext the Company's contention that the discharges were made in an effort to weed out inefficient employees.[8]

[8] The Board adopted the Trial Examiner's finding that the discharges of Benniefield and Frieson, who were terminated at a later date, did not violate the Act (R. 104, 148).

III

The Board's order

The Board's order (R. 105–111) requires the company to cease and desist from: (1) discouraging membership in any labor organization by discharging, refusing to reinstate, or in any other manner discriminating in regard to hire or tenure of employment, and (2) interrogating or threatening its employees concerning their union membership or activity, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

Affirmatively, the Board's order requires the company: (1) to offer reinstatement to the 17 employees[9] here involved; (2) to make whole these employees for loss of pay;[10] (3) upon request, to make available to the Board, or its agents, all payroll and other records necessary to analyze the amounts of back pay due under the terms of the Order; and (4) to post appropriate notices.

STATEMENT OF QUESTIONS INVOLVED

I. Whether the Board properly determined that the Company interfered with, restrained, and coerced

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[9] The reinstatement of Rosie Lee Campbell is ordered in the absence of convincing proof that she has been fully reinstated (R. 105, n. 7).

[10] The back pay of Minnie Lee Alston, Delores Caldwell, and Velma Pettis, all of whom left the State of Alabama after their discharge, is ordered abated between the date of the Intermediate Report, which recommended that back pay for these three employees be abated as of the date of their departure from the State of Alabama, and the Board's Decision and Order (R. 106, n. 10).

its employees in violation of section 8 (a) (1) of the act.

II. Whether the Board properly determined that the Company discriminatorily discharged 17 employees in violation of section 8 (a) (3) and (1) of the act.

III. Whether the Board properly rejected the Company's contention that Ezeakiel Caldwell was not qualified to file the charge herein.

IV. Whether the Company's application to adduce additional evidence should be denied.

ARGUMENT

I

The Board properly determined that the Company had interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act

The Board's finding that the Company unlawfully interfered with the self-organizational rights of its employees is abundantly supported in the record. Indeed, a more flagrant violation of the Act would be difficult to conceive. When the Union appeared on the scene, it took the Company less than 24 hours to demonstrate effectively to its employees that union activity would not be tolerated. On the evening of October 6, Union application cards were distributed among interested Company employees on the Hines bus (*supra,* p. 4). Early the following morning, the employees were subjected to intensive interrogation regarding the bus incident of the night before and their Union affiliation (*supra,* pp. 5–7), and one of them was warned that it would not "be so good for" anyone caught "messing around with the labor" (*supra,* p. 5). The same afternoon, the Com-

pany made good its threat by discharging the newly discovered Union adherents (*supra,* p. 7).

Thus, early on the morning of October 7, Foreman Bradshaw asked Employee Alston if she rode the bus and if she received a Union card and signed it (*supra,* p. 5). Ezeakiel Caldwell was questioned as to whether anyone had stopped him going to and from work and whether he signed a Union card (*supra,* p. 5). Many other employees were similarly interrogated regarding the activities of the night before (*supra,* pp. 5–7). Leona Steele was questioned whether a Union man had boarded the bus and distributed Union cards (*supra,* p. 6). When employees, through fear of being discharged, denied signing Union cards even though they had been bus passengers, they were berated for lying (*supra,* p. 6). Employee Sullivan was less discreet and admitted riding the bus and signing a card, whereupon she was pressed to reveal the identity of other bus riders (*supra,* p. 5).

Such questioning of employees by their supervisors has repeatedly been held by this and other courts to constitute interference, restraint, and coercion in violation of the Act. *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 518, 520; *N. L. R. B.* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 327; *Olin Industries* v. *N. L. R. B.,* 28 L. R. R. M. 2474, 2475, 2477, decided August 7, 1951 (C. A. 5); *N. L. R. B.* v. *Booker d/b/a Atlantic Stages,* 180 F. 2d 727, 728–729 (C. A. 5); *N. L. R. B.* v. *Fulton Bag & Cotton Mills,* 175 F. 2d 675, 677 (C. A. 5); *Sewell Hats, Inc.* v. *N. L. R. B.,*

143 F. 2d 450, 451–452 (C. A. 5), certiorari denied 323 U. S. 772; *N. L. R. B.* v. *Alco Feed Mills,* 133 F. 2d 419, 420–421 (C. A. 5). As this Court pointed out in *N. L. R. B.* v. *Alco Feed Mills,* 133 F. 2d, at 421, such questioning may well imply "a threat of some action to come." This implicit threat was not only made explicit in the morning to Caldwell (*supra,* p. 5), but it actually was carried out later that same day when the Company discharged almost all of the Hines bus riders (*supra,* p. 7). In these circumstances there can be no doubt as to the propriety of the Board's finding concerning the Company's questioning of employees concerning their union sympathies.

Equally valid is the Board's conclusion concerning Foreman Bradshaw's warning to Employee Caldwell that "It won't be so good for" anyone caught "messing around with the labor." Thus the employees were warned that union activities would be dealt with severely. This threat of reprisals for engaging in Union activities is unquestionably violative of Section 8 (a) (1) of the Act, as the Board found (R. 103). See for example, *Olin Industries, Inc.* v. *N. L. R. B.,* 28 L. R. R. M. 2474, 2475, 2477, decided August 7, 1951 (C. A. 5); *N. L. R. B.* v. *Continental Pipe Line Co.,* 161 F. 2d 302 (C. A. 5); *N. L. R. B.* v. *Peyton Packing Co.,* 142 F. 2d 1009, 1010 (C. A. 5), certiorari denied, 323 U. S. 730; *Sewell Hats, Inc.* v. *N. L. R. B.,* 143 F. 2d 450, 451–452 (C. A. 5), certiorari denied 323 U. S. 772; *N. L. R. B.* v. *Brown Paper Mill Co., Inc.,* 133 F. 2d 988, 989 (C. A. 5).

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II

The Board properly determined that the Company discriminatorily discharged 17 employees in violation of Section 8 (a) (3) and (1) of the Act

The facts set forth above fully support the Board's determination that the Company discriminatorily discharged the 17 employees here involved because of their Union activities. As we have seen, upon the advent of the Union the Company acted promptly and decisively. It immediately engaged in widespread interrogation of the employees suspected of having sympathy for the Union and warned one of them concerning the adverse consequences of unionization of the plant (*supra,* pp. 5–7). The very same day the Company precipitately discharged almost all of the employees who signed union cards (*supra,* pp. 7–8). The very sequence of events preceding the discharges eloquently reveals the discriminatory motivation therefor. The summary discharge of the employees, without prior criticism or warning, immediately following their concerted activity of the night before can be reasonably explained only upon the conclusions reached by the Board.

The Company claims that its foremen had no knowledge of the employees' Union activity or the events of the night of October 6. This self-serving assertion is wholly dispelled by the questioning which preceded the discharges, which conclusively established such knowledge. Thus, Bradshaw told Caldwell, "Well, somebody is messing with the labor around here" (R. 103; P. A. 183). Employee Steele, after admitting she rode the bus, was questioned as

to whether a Union man had boarded the bus and distributed Union cards (R. 128; P. A. 132). The foremen asked numerous employees if they rode the bus and if they had signed Union cards (*supra*, pp. 5–7). When Employee Sullivan admitted riding the bus and signing a card, Foreman Thomas questioned her relative to others who had ridden the bus (R. 123; R. A. 46–47, 60–61). When employees, through fear of discharge, denied the Union activities of the night before, they were told not to lie (*supra*, p. 6). Such interrogation fully establishes that the Company had the knowledge which it now disclaims.

At the hearing, the Company sought to explain the discharges on the ground that they were made pursuant to orders from the company's officials to weed out inefficient workers in furtherance of a process of building up a capable working force from a group of inexperienced employees. Though such instructions were apparently given, it is clear, as found by the Board, that these employees were not discharged in pursuance thereof. Indeed, as found by the Board (R. 140), the company foremen were "especially vague" as to the chronological sequence of the instructions to discharge and the actual dismissals. Thus, Foreman Rimmer testified that when he got the orders to eliminate incompetent employees, he "had already done it" (R. 136, 140; P. A. 234, 237–238), and Foreman Sledge said he had been "getting shed of them all along" (R. 140; P. A. 239). Significantly, at the time of discharge the employees were not told that they were being discharged be-

cause they were incompetent or less competent, most of them being advised instead that they were merely being laid off for a week or two and that they would be sent for when needed (*supra*, p. 9).[11] Cf. *N. L. R. B.* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 439–440 (C. A. 5).

Though asserting that the discharges were merely part of the process of eliminating the inefficient or "sorry hands," the foremen were, as the Board found, "unable or unwilling" to recall what, when, or why individual employees had been discharged (R. 136, 140; P. A. 237–238, 250–251, 253–257, 284–285, 294, 300). It is conceivable that these foremen who had daily contact with the employees might not be able to remember the facts surrounding the discharge of *every* employee. On the other hand, it is inconceivable that these foremen should be unable to recall *any* of the details surrounding the largest mass lay off of the year, particularly when those discharges allegedly were made pursuant to instructions from visiting Company officials. Yet, these responsible supervisors were merely able to recall that if they fired any employee on October 7[12] they fired only those who were inefficient or incompetent.[13] Though, at least for some

[11] Further reflecting on the company's asserted defense is the fact that Rosie Lee Campbell, the only employee to whom unsatisfactory work was mentioned at the time of discharge, was subsequently rehired (R. 126, 144; P. A. 100, 106–107).

[12] Foreman Rimmer testified affirmatively that he did not know if any were discharged on that date (P. A. 237–238).

[13] Foreman Bradshaw was able to recall three of the discharged employees, Ezeakiel Caldwell, Minnie Lee Alston, and Lillian

operations, employees were required to mark their numbers on pieces of furniture, so that rate of production and responsibility for rejected pieces might be fixed (R. 137; P. A. 292, 313–314), none of these records were produced at the hearing to sustain the asserted shortcomings of the discharged employees. Cf. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C. A. 2), certiorari denied, 304 U. S. 576 and 585.

The explanation for the striking inability of the Company officials to remember details is not difficult to discern, for it is established by uncontradicted evidence that, with one minor exception, none of the discharged employees had ever been criticized (*supra*, p. 9). With few exceptions, they had received no instructions whatever from their foremen concerning their performance of their work (*supra*, p. 9). None had been forewarned that unless they improved they would be discharged (*ibid.*). Cf. *N. L. R. B.* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 801 (C. A. 5); *N. L. R. B.* v. *El Paso Ysleta Bus Co.*, 190 F. 2d 261, 262 (C. A. 5). No effort whatever was made by the foremen to assist the employees in improving their work (*supra*, p. 9). Included among the dischargees were Ezeakiel Caldwell and his sister, Lillian Warmack, who, so far as the record shows, were the only 2 among 113 employees who had had any experience in furniture construction. They had done private upholstery work for Foreman Bradshaw.

Warmack (P. A. 300, 312). As to the efficiency of these employees, he merely commented that Lillian was "awkward" (P. A. 300–301).

Warmack was not employed until after this job was done. At the time he hired her, Foreman Bradshaw informed her that she had "a job as long as you want it here in the plant" (*supra,* p. 10). The discharge of these employees in these circumstances is not only a complete contradiction of the Company's contention that the discharges were to promote efficiency, but lends emphasis to their discriminatory character. *Eastern Coal Corp.* v. *N. L. R. B.,* 176 F. 2d 131, 133 (C. A. 4); *N. L. R. B.* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660, 663 (C. A. 2); *N. L. R. B.* v. *Illinois Tool Works,* 153 F. 2d 811, 814 (C. A. 7).

Indeed, the Company itself apparently realized this inconsistency for it contended at the hearing that Ezeakiel Caldwell was discharged because Foreman Bradshaw had heard that he was discussing the possibility of obtaining employment with a Mr. Gralapp, who operated a furniture store. It is true that Caldwell did some part-time work for Gralapp. In fact, it was because of Bradshaw and on his recommendation that it came about, and Bradshaw knew that it was part-time work and that it was not intended to and did not interfere with his work for the Company (*supra,* pp. 10–11). It is also true that Caldwell informed Bradshaw that he found the 40 cents an hour the company was paying him inadequate and that he had to do something if he did not get a raise (R. 146; P. A. 296, 303). Despite his knowledge of Caldwell's doing work for Gralapp, Foreman Bradshaw apparently arranged a raise in pay for Cald-

well shortly before his discharge, in an effort to retain his services (P. A. 185). Thus, the Company's contention with respect to Caldwell amounts to a complete reversal of positions on Foreman Bradshaw's part within a period of several days. Acceptance of this contention does indeed place "an unbearable strain on one's credulity," as the Trial Examiner noted (R. 146).

A further circumstance indicating the discriminatory character of the discharges is the fact that virtually all of the employees whom the Company suddenly found it necessary to weed out because of alleged inefficiency rode the Hines bus and had received and signed union cards. Only two of the discharged employees, Ezeakiel Caldwell and his sister, Lillian Warmack, had not been on the bus on October 6, when Union Representative Deloach boarded it and distributed union cards (*supra,* p. 7).[14] No other employees were discharged for inefficiency on this occasion (*supra,* pp. 7–8). Company foremen knew that Ezeakiel Caldwell, his sister, Lillian Warmack, and his daughter, Annie Lee Caldwell normally came to work together, and that Annie Lee and her sister-in-law, Delores Caldwell, had ridden the bus on October 6 (*supra,* pp. 7–8). All of the discharged employees, with one possible exception, received and signed Union

[14] The fact that a few bus riding employees were not discharged does not detract from this disparity of numbers. Rather than demonstrating nondiscrimination, the "escape" of these employees is more reasonably explained on the ground that they were either not detected or acted as informers.

application cards (*supra,* p. 8).[15] Though the Company asserts that these employees were fired for cause, "the long arm of circumstance cannot here be overlooked." *Peoples Motor Express* v. *N. L. R. B.,* 165 F. 2d 903, 905 (C. A. 4). The chances of all of the inefficient workers being confined to the group that signed union cards, as a matter of mathematical probability, are practically nil. This is a factor which the Courts have repeatedly held the Board may take into consideration in appraising employer's motives in similar situations. *N. L. R. B.* v. *Vail Manufacturing Co.,* 158 F. 2d 664, 666 (C. A. 7), certiorari denied, 331 U. S. 835; *N. L. R. B.* v. *Sifers Candy Co.,* 171 F. 2d 63, 65 (C. A. 10); *N. L. R. B.* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660, 663 (C. A. 2); *N. L. R. B.* v. *W. C. Bachelder,* 120 F. 2d 574, 578 (C. A. 7); certiorari denied, 314 U. S. 647; *Hamilton-Brown Shoe Co.* v. *N. L. R. B.,* 104 F. 2d 49, 53 (C. A. 8).

In view of the abrupt discharge without prior warning of virtually all of the employees who signed union cards immediately after the Company learned of their interest in the union, the unsupported character of the explanation given, and the other factors discussed above, it is submitted that there is an ample basis for

[15] It is irrelevant that the record does not show that Minnie Lee Alston signed a card and that Ezeakiel Caldwell did not deliver his until after his discharge, for both were unlawfully interrogated and suspected of Union activity (*supra,* pp. 5, 8). *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 589–590; *N. L. R. B.* v. *Robbins Tire & Rubber,* 161 F. 2d 798, 801 (C. A. 5).

the Board's finding (R. 142) that the discharges were attributable to the Company's "desire to eliminate the first employees who manifested an interest in unionization and thereby set an example before, and frighten and coerce other employees whom it felt would subsequently be approached." [16]

[16] Though contending in its Petition for Review that it was error to order reinstatement and back pay for three employees after their departure from the State of Alabama following their discharge, the company presents no argument in its brief and is therefore presumed to have abandoned its contention. *N. L. R. B.* v. *Kentucky Utilities Co.*, 182 F. 2d 810, 814 (C. A. 6); *N. L. R. B.* v. *National Mineral Co.*, 134 F. 2d 424, 425 (C. A. 7). In any event, the Board has consistently held that employees found to have been discriminatorily discharged, whether or not they have left the state or obtained equivalent employment, should be offered reinstatement with back pay as an appropriate remedy to effectuate the policies of the Act and restore the *status quo*, unless evidence appearing in the record justified a different remedy. See *Crossett Lumber Co.*, 8 N. L. R. B. 440, 497–498; *The Russell Manufacturing Co.*, 82 N. L. R. B. 1081, 1087. Clearly, the mere fact that the discharged employee has left the state does not mean that the employee is no longer available for reinstatement. It has been the Board's experience that employees frequently accept offers of reinstatement despite the fact that they have left the state. In many instances, the employees are forced to leave the state in an effort to obtain other employment. Hence it is only reasonable that the Board should treat discharged employees who have left the state just as it treats other discharged employees. Accordingly, the Board's determination (R. 105–106) that the employees who have left the state are nevertheless entitled to reinstatement is well within the limits of the Board's discretion. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82. "Reinstatement is the conventional correction for discriminatory discharges." *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 187. Reinstatement is ordered not merely "to repair the economic loss" of the particular employees involved (*Phelps-Dodge* case, at 193) but also to assure the employees as a whole of their right to self-

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III

The Board properly rejected the Company's contention that Ezeakiel Caldwell was not qualified to file the charge herein

The Company contends that the Board erred in denying the motion to strike from the complaint the names of all the dischargees, except Ezeakiel Caldwell, who signed the charge. Its contention is apparently twofold. First, the Company urges (Br. pp. 13, 31–33) that one discharged employee may not file a charge on behalf of others similarly discharged without express authorization from each employee named in the charge. Secondly, the Company argues (Br. pp. 17–18, 32) that in any event the Board should not sanction the filing of a charge by an individual where a union is in a position to benefit therefrom, for to do so is to enable a union which has not complied with the requirements of Section 9 (f), (g), and (h) of the Act (the financial reporting and non-communist affidavit provisions) to circumvent these provisions of the statute.

The complete answer to the first aspect of the Company's contention is that the statute does not place any limitation upon who may file charges. As stated by the Supreme Court in *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18:

> The Act requires a charge before the Board

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organization. As stated by the Supreme Court in the *Phelps-Dodge* case, 313 U. S. at 195 "Reinstatement may be the effective assurance of the right of self-organization. * * * without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged."

> may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the legislative hearings Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it was often not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge. The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading. Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry.

In view of the foregoing and bearing in mind that the Board acts solely as a public agency in the public interest and not on behalf of any employer, employee or group of employees (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265), there can be no question but that once it is charged that an employer or union has engaged in unfair labor practices it is the Board's duty to investigate, and if it determines, after the usual proceedings prescribed in the Act, that unfair labor practices have in fact been engaged in, it is the Board's obligation to issue an appropriate remedial order, regardless of whether the order redounds to the benefit of an employee who has expressly authorized the filing of charges on his behalf or not.

With respect to the second aspect of the Company's contention, namely, that Caldwell, who filed the charge herein, was in effect "fronting" for the Union, which had not qualified under Section 9 (f), (g) and (h) of the Act, it should be noted that we have nothing more than the Company's wholly conjectural assertion that Caldwell was acting on behalf of the Union, for the Company neither proved nor attempted to prove that Caldwell was in fact "fronting" for the Union, and there is no evidence in the record to sustain such a claim. But in any event this contention is foreclosed by the recent decision of this Court in *N. L. R. B.* v. *Augusta Chemical Co.,* 185 F. 2d 63 (C. A. 5) rejecting an identical contention on facts much more strongly in favor of the employer than those in this case. There the Court, after pointing out that the real purpose of the Act "was not to favor or promote unions as such" but rather "to promote and protect the rights of individual employees to join or not to join unions and to be free from coercion and interference either way," disposed of the employer's contention with these words:

> We are in complete disagreement with Respondent's position on this point. Granted that the disqualified union was active in assisting, indeed in directing, the employees in preparing their charges, it does not at all follow that the employees, by accepting that assistance, disqualified themselves.

To the same effect is *N. L. R. B.* v. *Clausen,* 188 F. 2d 439, 443–444 (C. A. 3).

IV

The Company's application to adduce additional evidence should be denied

The Company, for the first time, in its Petition for Review requests that this Court take cognizance of an affidavit attached to its Petition for Review and that it be permitted to adduce additional evidence. The evidence sought to be adduced consists of the testimony of John Proudfoot, its Manager, who allegedly will testify (1) that he had no knowledge of union efforts to organize Company employees at the time of the discharges; (2) that the employees were discharged for the reasons set forth in his previous testimony; (3) that as far as he knows the discharged employees had not applied for union membership prior to discharge; (4) that prior to the discharges, he had not been approached relative to union organization of his employees, but if he had been, he would have agreed to the holding of an election; and (5) that, subsequent to the hearing and issuance of the Intermediate Report in these proceedings, he was approached by the Union and entered into a stipulation for the holding of an election, but that approximately one hour later some of the Company's employees, together with employees of another company, went on strike during the course of which unnamed persons engaged in violence.

It is submitted that the Company's request should be denied for it is insufficient on its face in that it completely fails to meet either of the requirements of Section 10 (e) of the Act, which provides that a party

seeking leave to adduce additional evidence must "show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board * * *." Proudfoot, whose testimony petitioner now seeks to adduce, was a witness for petitioner at the hearing in these proceedings. With the exception of testimony touching alleged events occurring subsequent to the hearing before the Trial Examiner, all the testimony now sought to be adduced was available and could have been presented at the time of the hearing, and no reason for its nonproduction has been advanced. The evidence concerning Manager Proudfoot's alleged lack of knowledge of the union sympathies of the employees here involved, is wholly immaterial for the record clearly shows that his subordinates, the foremen, who actually effected the discharges, had full knowlege of the Hines' bus incident before they made the discharges. The evidence respecting the alleged reasons for the discharges, which petitioner now seeks to adduce, was actually presented by Proudfoot at the hearing before the Trial Examiner in this proceeding. With regard to the events of September 1950, including particularly the acts of violence mentioned in Proudfoot's affidavit, it should be noted that, contrary to the statement of the Company (Br. pp. 16–17), these incidents occurred prior to the issuance of the Board's decision and order on October 23, 1950. However, petitioner made no attempt to have the Board reopen the record in this proceeding prior to the issuance of its order for the

purpose of adducing evidence concerning these events. Having failed to avail itself of the existing administrative remedy, it cannot now show "'reasonable grounds for the failure to adduce such evidence * * *.'" "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation." *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U. S. 335, 340.

In any event, these matters which allegedly occurred after the hearing before the Trial Examiner are not material to the issues here involved. The sole issues involved in this proceeding are whether the Company in October 1949 discharged employees because of their Union activities in violation of Section 8 (a) (3) and (1) of the Act and engaged in interrogation and threats in violation of Section 8 (a) (1) of the Act and the appropriate remedial order to be entered by the Board. The fact that the Company, in September 1950, may have entered into an agreement for a consent election and that thereafter certain unnamed employees of Southern Furniture Manufacturing Company and another company, not here involved, went on strike and engaged in violence in no way affects the Board's finding that the Company a year before interfered with and discriminatorily discharged certain employees. The Company apparently contends that a willingness to enter into a consent election agreement with a union after an Intermediate Report has been issued finding the company guilty of certain unfair labor practices demonstrates

that the Company was never opposed to the unionization of its employees. Assuming repentance and a change of policy after being found guilty of unlawful acts, such considerations although they are to be desired, can not change the nature of the prior unlawful acts. Cf. *N. L. R. B.* v. *Vincennes Steel Corp.*, 117 F. 2d 169, 173 (C. A. 7).[17]

CONCLUSION

It is respectively submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper in all respects, and that a decree should issue enforcing the Board's order in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
OWSLEY VOSE,
ROBERT G. JOHNSON,
Attorneys,
National Labor Relations Board.

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[17] *N. L. R. B.* v. *Indiana & Michigan Elec. Co.*, 318 U. S. 9, upon which the Company relies, has no application here. In that case, unlike here, the matters sought to be adduced had relevance to the issue and the Company sought to adduce the evidence before the Board. The *Electric Co.* case involved a charge of company domination of a union, and the evidence sought to be adduced concerned subsequent activities on the part of the principal witnesses in the case and affected not only their credibility but the good faith of employees in testifying relative to their preference for the company union over the union which engaged in subsequent violent misconduct.

APPENDIX

* * * * *

[15] FRED C. DELOACH, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[47] Redirect examination by Mr. STARK:

Q. Let's clear up this matter of this parking area or driveway you've talked about, is it true or not, if I may lead, that driving along the highway towards the company's plant, you turn off of the highway into this driveway parking area right in front of the company's building?—A. Yes.

Q. And do you know what part of the company's organization is in the first part of the building that you approached when you turned into this area?—A. No, sir.

Q. Let me ask you this, is it true or not that you have seen cars, numerous cars, parked in this driveway parking area that you're talking about?—A. That's right.

[48] Q. And that is right in front or along the side of the company's plant?—A. That's correct.

Q. You stated that you talked to some of these people during their lunch hour, do you know, is that their usual place to eat lunch, out there in that driveway parking area?—A. Some of them does, some of these—some of them goes to the commissary.

Q. That is not a developed community, is it, it's one lone building out there, more or less by itself, is it not?—A. Yes, sir.

* * * * *

[50] ERNEST HINES, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[79] Trial Examiner BEAN. Let me ask this one question. Were any of these cards, Ernest, signed on the bus or did the people just take them home that Thursday?

The WITNESS. Some cards were taken home—some were signed on the bus where I was driving, some was taken home, some was given—some came in, some cards I brought in, was given to me was not by people riding on the bus, that was trying to get a union in.

* * * * *

Redirect examination by Mr. STARK:

Q. Ernest, there's something in the record [80] about who passed out these cards that afternoon, who did pass out the cards among the employees that Mr. DeLoach had, these cards Mr. DeLoach had, who passed them out among the employees in the bus, one or more people?—A. If I weren't mistaken, it was Van Hurd.

Q. Van Hurd?—A. Yes, sir.

Q. Anybody else—what do you mean by passing them out?—A. Well, he was a kind of a porter on the bus with me, he was kind of a watchman and unless I was driving alone, I would give him authority over the bus to the employees.

Q. Mr. DeLoach was standing up in the front part of the bus; is that right?—A. Yes.

Q. And he handed cards to Van Hurd, to hand on back to the employees?—A. Yes.

Q. Did you hand them to anybody?—A. Yes, sir.

Q. You handed a few back?—A. Yes, sir.

Q. Some other employees handed some—I mean, as the cards were handed back?—A. Just passed them over the bus.

* * * * *

[109] FLOSSIE MAE CARROLL, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[129] Redirect examination by Mr. STARK:

Q. Flossie, in calling out to the company to ask for a job, did you ask to speak to any particular person?—A. Yes, sir.

Q. Who did you ask to speak to when you called?—A. Mr. Dean.

* * * * *

Q. And when you would ask to speak to Mr. Dean, did someone [130] answer the phone?—A. Yes, sir.

Q. Did someone come to the phone to talk to you?—A. Yes, sir; it was a lady answered first and I told her I wanted to speak to Mr. Dean, and she told me to wait, she would connect me with him, to hold the phone and she did.

Q. Then, what happened; you started talking to some man?—A. Yes, sir.

Q. And did this man who answered the phone say who he was?—A. Yes, sir; he said it was Mr. Dean.

Q. All right, what—how many times have you called Mr. Dean?—A. About four times.

Q. On any of these occasions or on all of them, what did Mr. Dean say to you as to why he couldn't rehire you or something?—A. He didn't tell me why, he just told me he didn't have nothing for me to do and he told me one time, if he found something for me to do, he would send word by Geneva.

* * * * *

[132] Trial Examiner BEAN. Do you know whether Geneva and this woman named Morgan, whether they signed cards?

The WITNESS. I couldn't tell you whether they signed them or not, but they taken them, I didn't see them pass them back in.

* * * * *

[272] VAN J. HURD, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. STARK:

Q. That's Van J. Hurd, isn't it?—A. Yes sir.

* * * * *

[280] Q. All right, the timekeeper, do you know his name or did you know his name at that time?—[281] A. I don't know his name.

Q. Why do you call him the timekeeper?—A. Well, when I were hired out there, Mr. Schrader, he came and carried me to the timekeeper and had him to write me up and give me a clock number, and then after he did that, he carried me back to Mr. Schrader.

Q. What do you mean by writing you up?—A. Well, got my name and address and social security number. He gave me a clock number, a card number, rather.

Q. Card number, and did you say that he took you back to Mr. Schrader?—A. That's right.

Q. And at that time, Mr. Schrader put you to work?—A. Mr. Schrader carried me and took me to some of the other employees and they showed me what to do.

* * * * *

[282] Q. Now, let's get back to the time, October 7th, Friday, you said the timekeeper said something to you, tell us what he said to you.—A. He came to me a little after lunch, I'd say around about 1:30 or two o'clock, he asked me, "How do you get to work?" and

I said "Sometime I rides the bus * * *"—pardon me, I'm a little off, he says to me, "How do you get to work? Do you ride the bus or ride with Deacon Caldwell?" I said to him, "Sometime I rides the bus and sometime I get there the best way I can." He did like that and walked off, no more said [indicating].

Q. He shrugged his shoulders?—A. That's right, and walked off.

* * * * *

Q. All right, anything else happen that day; that afternoon?—A. Well, I forget the name, I never considered anyone my foreman except Mr. Schrader because he's the one that hired me and he's the one that carried me to where the position I was to work in so it was a gentleman, don't know his name, that brought me my first pay slip.

Q. Well, was he a white man?—[283] A. White man, he brought me my regular pay slip, which was for the previous week and later on, about four o'clock, in the afternoon, Mr. Dean came to me and said, "Hurd, we're going to have to lay off a few, we don't know for how long, it may be for a week or a month, but when we need you, we'll call you." I didn't say any more, I just got my jacket.

Q. You say a Mr. Dean said that to you and handed you another pay slip?—A. Handed me another pay slip.

Q. Was that Mr. Dean Thomas?—A. I presume it was, I never did know anything but Mr. Dean.

* * * * *

Q. Now, Van, you say that Mr. Dean told you he was going to have to lay you off and maybe a week or two weeks before he called you back, something like that, I will ask you specific[284]ally, can—did Mr. Dean say to you anything in substance that he was

laying you off because of unsatisfactory work?—A. He did not.

Q. What you told us he said is all he said?—A. That is all he said.

Q. And these two pay slips, what did you do with them?—A. I signed them and drawed my money.

Q. And now you say that the first pay slip was given to you by a man that you don't know his name?—A. That's right.

Q. To refresh your memory, was his name Jack?—A. I believe it was.

* * * * *

[285] Redirect examination by Mr. STARK:

[286] Q. Van, you said you were on the bus and that you were a porter and all, I will ask you before you got to the point where Mr. DeLoach got on the bus, did you or did you not let off some people or rather, did any people get off of the bus?—A. I let off about five.

Q. Where was that?—A. That was at Navco Road and highway 90.

Q. And you say you let them off, what do you mean by that?—A. Well, I was the one that opened the door for them to get off.

Q. You opened the door?—A. That's right.

Q. You say there was about five?—A. About five.

* * * * *

[289] ANNIE LEE CALDWELL, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

[292] Q. You gave them to Ernest the next morning?—A. The next evening; I gave mine the next evening.

Q. You gave yours to Ernest the next evening?—A. Next evening.

Q. Annie, did you get one card from Mr. DeLoach or did you get more than one card?—A. I got more than one.

* * * * *

Q. By the way, did you get these cards from Mr. DeLoach or [293] did somebody pass them out?—A. Van Hurd passed them out.

Q. Van Hurd; now, you say you got more than one card?—A. Yes, sir.

Q. You said how many?—A. Three or four.

Q. Three; what did you do with the other cards, you signed one, yourself, what did you do with the other cards?—A. Well, since my daddy and auntie had to work late, I took some cards to give them one to sign.

Q. To your daddy?—A. And my auntie.

Q. And you turned only your own card into Ernest Hines the following evening?—A. No; I turned my auntie's and my card in.

Q. You turned your auntie's card in—can you identify your aunt?—A. Lillian C. Warmack.

Q. Now, can you tell us just what those cards were that you signed?—A. They were union application cards.

Q. Application for the union. You worked on Friday, that would be Friday, October 7th?—A. Yes, sir.

* * * * *

[296] Q. How long after the first conversation that Mr. Dean had with you did this second conversation take place; how long afterwards?—A. He left, and I guess he thought to ask me something else and he come back.

Q. Did Mr. Dean speak to you again at any time during that day, Friday, October 7th?—A. No, he didn't; not until he came back and brought my slip.

* * * * *

Q. He did talk to you again; well, what time that evening did he speak to you?—A. Let's see, well, it was about four o'clock.

Q. Four o'clock; well, at that time, what did he say to you?—A. He just came around and brought me my slip, at four o'clock.

Q. He brought you your slip; what slip are you speaking of?—A. The regular pay slip.

* * * * *

[297] Q. Did you receive another pay slip that afternoon?—A. Yes, sir.

Q. Who gave you that other pay slip?—A. Mr. Dean.

* * * * *

[322] LILLIAN C. WARMACK, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. STARK:

Q. Lillian, where do you live?—A. 407 Bay Bridge Road, Magazine Point, Mobile, Alabama.

* * * * *

[330] Q. Okay, what did you do with the card, Lillian?—A. Gave it back to Annie Lee.

Q. Before you gave it back to her, did you, yourself, do anything with the card?—A. Yes, sir; I signed it.

* * * * *

Q. Gave it back to Annie Lee—now, Lillian, you say you got [331] laid off that day; tell us how you got laid off; what happened?—A. Well, after we came

in from lunch, Mr. Bradshaw, he walked up to me and asked me what was my clock number.

* * * * *

Q. Well, Lillian, who told you you were laid off?—A. Mr. Bradshaw—Mr. Dean, he was the one that brought our last pay slips, Mr. Bradshaw, after he asked me my clock number, and the later time, he come along about four o'clock, some after four, brought me my first pay slip.

Q. Now, who brought you the first pay slip?—A. Mr. Bradshaw.

Q. Mr. Bradshaw?—A. First pay slip; yes, sir.

Q. Around four o'clock, you say?—[332] A. Yes, sir.

Q. Okay, then, what else?—A. And about a half an hour after then, Mr. Dean come around.

Q. Mr. Dean Thomas?—A. Yes, sir.

Q. Uh, huh.—A. He brought me my final pay slip, and I asked him what was that, what did that mean and he said "that means I don't need you no more."

* * * * *

By Mr. STARK:

Q. That is, Mr. Dean who—Mr. Dean said that?—A. That's right; yes, sir.

* * * * *

Q. Lillian, at the time Mr. Dean gave you this slip or at the time Mr. Bradshaw gave you the first slip, I will ask you, did either one of them say your work's not satisfactory or anything like that?—A. No, sir; I never did have no complaint.

* * * * *

DEPOSITION OF VELMA PETTIS

[1] UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIFTEENTH REGION

Case No. 15–CA–227

In the Matter of SOUTHERN FURNITURE MANUFACTURING COMPANY *and* EZEAKIEL CALDWELL, AN INDIVIDUAL

Deposition of Velma Pettis, a witness called on behalf of the General Counsel, taken before me, the undersigned, William L. Morse, a Notary Public in and for the County of Cuyahoga, State of Ohio, pursuant to (1) certified excerpt of record authorizing taking of deposition; (2) copy of telegram extending time for taking depositions to April 29, 1950; (3) stipulation providing for appointment of representative of Ethel E. Fisher and Associates as officer to take deposition, hereto attached and made a part hereof, and pursuant to the direct interrogatories, cross-interrogatories and redirect interrogatories propounded to the said Velma Pettis, copies of which are attached hereto and made a part hereof, at the offices of Messrs. Newkirk, Fincun, Hagan & Morse, 1770 East 11th Street, Cleveland, Ohio, authorized representatives in Cleveland, Ohio, of Ethel E. Fisher and [2] Associates, Official Reporter to the National Labor Relations Board, on Thursday, the 27th day of April 1950, at 11:00 o'clock, a. m.

VELMA PETTIS, the witness named in the attached Certified Excerpt of Record authorizing taking of deposition, being of lawful age, and being by me first duly sworn, as hereinafter certified, to depose the

truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

DIRECT INTERROGATORIES PROPOUNDED BY GENERAL COUNSEL TO VELMA PETTIS

1. State your name and present address.—A. My name is Velma Pettis; I live at 1109 Fairwell, Sandusky, Ohio.

2. Did you ever work for the Southern Furniture Manufacturing Company located at Navco, Mobile County, Alabama?—A. I did.

3. If your answer to interrogatory No. 2 is "Yes," state the approximate date you began to work for that company and the approximate date you left the company.—A. Well, I can tell when I left, but the date I started—I started in September, I worked about four weeks in September—I mean about four weeks in all. I really done forgot. It was on the 7th of October when I left from where I was working at.

[3] 4. What was your job, rate of pay, and who was your foreman?—A. I was in the sanding room, we was wiping paint. My rate of pay was 40 cents an hour. My foreman was Mr. Charles.

* * * * *

[4] 9. Did your foreman ever criticize your work, reprimand you, or call you down about the way you were doing your job?—A. He never did.

10. If your answer to interrogatory No. 9 is "Yes," state the approximate dates on which your foreman criticized your work and what he said to you on each occasion, if more than one.—A. He never did say anything.

11. Shortly before you left the company, how did you get to and from work: Did you walk, ride in a car, ride in a bus?—A. In a bus, rode in a bus.

12. Specifically, and to refresh your memory if necessary, did you on any occasion ride a bus operated by a man named Ernest Hines?—A. I sure did.

13. If your answer to interrogatory No. 12 is "Yes," state whether other employees of Southern Furniture Manufacturing Company also rode this bus.—A. There was a lot of them. There was a gang of them rode it.

[5] 14. If your answer to interrogatory Nos. 12 and/or 13, are "yes," were you riding this bus when anything unusual happened on the bus?—A. I sure was.

15. If your answer to interrogatory No. 14 is "Yes," describe in detail what happened on the bus that was unusual.—A. Well, I mean that was when the union man—I really don't know his name—when he got on the bus and give us some cards, you know, to sign, in the union.

It was, I believe, on Thursday evening when he give us those cards, gave them to us to sign. And he told us to sign them and turn them back in, give them to the bus driver the next morning. And so we did. And when we signed them and gave them to the bus driver the next morning, he take them in——

* * * * *

[6] 16. Specifically, and to refresh your memory if necessary, were you riding the bus when a man got on the bus and passed out union application cards to people on the bus?—A. Yes; I was.

17. If your answer to interrogatory No. 16 is "Yes," relate in detail what happened on the bus if you have not already done so in answer to interrogatory No. 15.—A. I have already answered that question before that the union man got on the bus and passed out the cards and asked us to sign them and turn them in to the bus driver.

18. If your answer to interrogatory No. 16 is "Yes," did you take a union card?—A. Yes; I sure did.

19. If your answer to interrogatory No. 18 is "Yes," state the approximate date of the incident, what you did with the card, to whom you returned the card if anyone, and the date that you returned the card, and the name of the union.—A. Let me see, it was—you mean the date that we got the cards? It was on a Thursday, that must have been on the 6th. We got fired on the 7th. It was on the 6th of October.

I turned the card in to the bus driver the next morning. I turned the card in to the bus driver on the 7th.

* * * * *

[7] 24. Did any foreman ask you your clock number or rack number?—A. Yes.

25. If your answer to interrogatory No. 24 is "Yes," state the name of the foreman, the approximate date or day and time [8] of the incident, what the foreman said to you and what you said to the foreman.—A. That was Mr. Charles. I don't know exactly what time it was, but it was on the 7th; the 7th day of October. And, I don't know—I am doing some guesswork now—it must have been around about four o'clock. I think we knock off about five. It might have been around four or four-thirty, just about that time.

He said, he asked me my clock number. And I told him 55. And before knocking—before quitting time he asked me, "What did you say your clock number was?" And I told him, "55." I says, "Mr. Charles, you done paid me my pay envelope."

He said, "Oh, yes; but I have another one for you, and I won't need you Monday." That is all he said to me.

26. On the day you left the company, did any foreman give you a pay slip with which to draw your wages?—A. Yes; Mr. Charles.

27. If your answer to interrogatory No. 26 is "Yes," state how many pay slips you were given, if more than one, the name or names of the foreman who gave you the pay slips, the approximate time of day that you got each slip, and what the foreman said to you on each occasion.—A. I was given just two pay slips. Mr. Charles was the foreman that gave me the pay slips.

I got the first pay slip about—I don't know exactly [9] what time that was, but Mr. Charles asked me my clock number, and I told him 55.

Then he came back and gave me my pay slip. Then later, about four or four-thirty that same day, October 7th, he came back again and asked me what my clock number was. I told him 55. And I said, "Mr. Charles, you already paid me."

And he said, "Yes; but I have another one, another slip for you. And I won't need you Monday."

* * * * *

GENERAL COUNSEL'S EXHIBIT 23

	Number of employees	Hired	Laid off	Now in employ
Week ended—				
July 9	23	23	4	42
July 16	42	5	6	41
July 23	41	2	5	38
July 30	38	11	3	46
Aug. 6	46	19	2	63
Aug. 13	63	9	7	65
Aug. 20	65	23	5	83
Aug. 27	83	10	9	84
Sept. 3	84	15	10	89
Sept. 10	89	9	4	94
Sept. 17	94	24	3	115
Sept. 24	115	16	10	121
Oct. 1	121	9	12	118
Oct. 8	118	17	22	113
Oct. 15	113	7	8	112
Oct. 22	112	10	4	118
Oct. 29	118	5	3	120
Nov. 5	120	30	5	145
Nov. 12	145	26	17	154
Nov. 19	154	7	6	155
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U. S. GOVERNMENT PRINTING OFFICE: 1951

PETITION

FOR A

WRIT OF

CERTIORARI

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SOUTHERN FURNITURE MANUFACTURING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

No._____

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your Petitioner respectfully shows:

On October 19th, 1949, a Charge was filed with the National Labor Relations Board against Southern Furniture Manufacturing Company, the Petitioner, by Ezeakiel Caldwell, individually, (Transcript of the Record, Page 45). Attached to this charge was Exhibit "A" naming twenty-eight former employees of the Petitioner, whose employment had been terminated, the Charge stated, "because of their membership and activities in behalf of District 50, United Construction Workers of America, United Mine Workers, a labor organization," the Charge further alleging that "By the acts set forth in the paragraph above and by other acts and conduct, it, by its officers, agents and representatives, interferred with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act." (Transcript of the Record, Pages 46 and 47).

Thereafter, on the 28th day of January, 1950, the Charge brought against the employer was amended, and this first amended Charge was signed by Ezeakiel Caldwell, and

there was attached to the first amended Charge Exhibit "A" setting out the names of thirty-four employees (including the name of Ezeakiel Caldwell). (Transcript of the Record, Pages 51-55, incl.)

Thereafter a complaint was issued by the National Labor Relations Board against Southern Furniture Manufacturing Company, the Petitioner, (Transcript of the Record, Page 55) in which it was alleged that Southern Furniture Manufacturing Company, the Petitioner, discharged and refused to reinstate the employees named in the complaint because of their membership in and activities on behalf of United Construction Workers, affiliated with District 50, United Mine Workers of America, Independent, a labor organization within the meaning of the Act, and because of their concerted activities engaged in for the purposes of collective bargaining or other mutual aid and protection. (Transcript of the Record, Page 58).

After a hearing before the Trial Examiner an Intermediate Report was issued by Trial Examiner Stephen S. Bean on June 7th, 1950, (Transcript of the Record, Page 112), holding, in effect, that Southern Furniture Manufacturing Company had discriminated against and discharged certain of its employees for activity on behalf of a labor organization. Thereafter the General Counsel of the National Labor Relations Board (Transcript of the Record, Page 100), and Southern Furniture Manufacturing Company, the Petitioner, (Transcript of the Record, Page 87) filed exceptions to the Intermediate Report.

The Board reviewed the rulings of the Trial Examiner and found that no prejudicial error was committed, and on October 23rd, 1950, the Board made its decision and issued an order by the terms of which the Petitioner was directed to offer immediate and full employment to the employees named in the order and not to discriminate in regard to hire and tenure of employment because of membership in or activity on behalf of any labor organization. (Transcript of the Record, Page 102).

A petition for review was presented to the Judges of the United States Court of Appeals for the Fifth Circuit on November 14th, 1950, (Transcript of the Record, Page 1). On January 31st,1952, Circuit Judges Holmes, Strum and Rives rendered a decision to the effect that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the order of the Board is, therfore, enforced. (Transcript of the Record, Page 168.)

THIS COURT HAS JURISDICTION

The jurisdiction of this Court is invoked under the United States Code entitled "Judiciary and Judicial Procedure" (28 U.S.C.A. 1254), and under the National Labor Relations Act, as amended (29 U.S.C.A. 160 (e)). It is contended that the Supreme Court has jurisdiction to review the judgment or decree here in question. The jurisdiction of this Court rests on Section 1254 of Title 28, United States Code Annotated, and on Section 160 (e), Title 29, United States Code Annotated (the National Labor Relations Act).

This case involves:

1. "An important question of Federal law which has not been but should be settled by this Court" (Supreme Court Rule 38, Par. (5) (b)).

2. The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in this case in conflict with National Labor Relations Board vs. Alside, Inc., 192 Fed. (2d) 678, a decision of the Circuit Court of Appeals of the Sixth Circuit on the same matter.

3. The great importance of the National Labor Relations Act ,as amended, to the business world, including both industry and labor, demonstrates the need of an authoritative and elucidating decision, particularly as to Section 9 (f) (h) of the National Labor Relations Act, as amended.

THE QUESTION PRESENTED

By the terms of Section 9 (f) (h) of the National Labor Relations Act, as amended, it is provided that "no complaint shall be issued pursuant to a charge made by a labor organization under Sub-section (b) of Section 10 unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit" shall have filed the requisite reports and unless its officers have filed the required non-communist affidavits. (Section 9 (f) (h), National Labor Relations Act, as amended).

Petitioner moved that the complaint be dismissed (a) in its entirety and (b) as to all persons except Ezeakiel Caldwell on the ground that none of the persons named in the complaint other than Ezeakiel Caldwell signed the charges nor was it proven that the charges made in the complaint or otherwise were signed by any one authorized to represent them, and that the charges were brought by Ezeakiel Caldwell, a member of the United Construction Workers, affiliated with District 50, United Mine Workers of America, who served as agent or representative or "front" of the said union, which had not complied with the registration and affidavit requirements of the amended Act, — the said Ezeakiel Caldwell having served as the agent or representative or "front" of the non-complying union in order to aid and abet the union in doing what it could no do without compliance with Section 9 (f) (h) of the National Labor Relations Act, as amended. (Transcript of the Record, Page 116, Motions (a) and (b). The motion was denied and the ruling of the Trial Examiner was affirmed by the decision and order of the National Labor Relations Board (Transcript of the Record, page 102) and this affirmation was confirmed by the Court of Appeals in its opinion of January 31st, 1952. (Transcript of the Record, page 168).

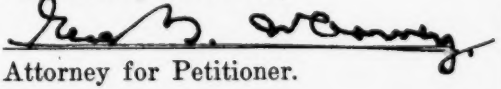
REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The intent of the National Labor Relations Act, as amended, was to make it impossible for any union which had failed to comply with the registration and affidavit requirements of the amended Act to avail itself of any of the rights or privileges accorded by the Act prior to its compliance with the law. It is equally clear that it was the intent of the Act of Congress to prevent any individual serving as agent or representative or "front" of any union thus disqualified.

2. The denial of the Petitioner's motion to dismiss the complaint in its entirety and its motion to strike from the complaint the names of all persons except Ezeakiel Caldwell by the Trial Examiner and the affirmation of his action by the National Labor Relations Board and by the Court of Appeals for the Fifth Circuit destroys the intent of the Act of Congress and renders the registration and affidavit requirements of the National Labor Relations Act, as amended, nugatory, void and of no effect.

3. The intent of the Act of Congress was to prevent a union which had not complied with Section 9 (f) (h) of the National Labor Relations Act, as amended, from availing itself of any of the rights or privileges accorded by the Act, and if the decision of the Court of Appeals for the Fifth Circuit affirming the orders of the National Labor Relations Board and the Trial Examiner is to remain in force and effect, the provisions of the National Labor Relations Act relative to registration and affidavit requirements of unions will become meaningless and ineffective.

Respectfully submitted,



Attorney for Petitioner.

C. M. A. Rogers and
McCorvey, Turner, Rogers, Johnstone & Adams
Of Counsel

SOUTHERN FURNITURE MANUFACTURING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

IN THE SUPREME COURT OF THE UNITED STATES

No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in full in the Record. (Transcript of the Record, Page 168). The opinion, in so far as we have been able to determine, has not been printed in any of the Reporter Systems, and is only available at the time this brief is written in the Record.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. C.A., 1254. The Circuit Court of Appeals has in this case "decided an important question of Federal law which has not been but should be settled by this Court." (Supreme Court Rule 38 (5) (b)).

The Circuit Court of Appeals has rendered a decision in this case in conflict with National Labor Relations Board vs. Alside, Inc., 192 Fed. (2d) 678, a decision of the Circuit Court of Appeals for the Sixth Circuit, on the same matter.

The great importance of the National Labor Relations Act, as amended, to the business world, including both in-

dustry and labor, demonstrates the need of an authoritative and elucidating decision, particularly as to Section 9 (f) (h) of the National Labor Relations Act, as amended.

Judgment was entered in this case by the United States Court of Appeals for the Fifth Circuit on January 31st, 1952.

STATEMENT OF THE CASE

A statement setting out the charge brought against Southern Furniture Manufacturing Company by Ezeakiel Caldwell and the issuance of a complaint by the National Labor Relations Board against Southern Furniture Manufacturing Company is set out in the introductory paragraphs of the Petition for Writ of Certiorari to the United States Court of Appeals addressed to the Chief Justice and the Associate Justices of this Honorable Court, and any further statement would be repetition only of what was said there. The only additional statement which may be required to a fuller understanding of the issues involved is the fact that the attorneys for the Petitioner, Southern Furniture Manufacturing Company, from the time the complaint was issued by the National Labor Relations Board and heard by the Trial Examiner and until this present date, have insisted that Ezeakiel Caldwell was serving as the agent, representative or "front" of United Construction Workers, affiliated with District 50, United Mine Workers of America, Independent, a labor organization within the meaning of the National Labor Relations Act which, at the time the charges were brought and at all times subsequent thereto, had never complied with the provisions of Section 9 (f) (h). (29 U.S.C.A. 159 (f) (h)).

Ezeakiel Caldwell was a member of the union. He and others went with representatives of the union to New Orleans to appear before officials of the National Labor Relations Board and present his charge. (Transcript of the Record, Appendix to Brief for Petitioner, Pages160 et seq.)

The litigation was instigated by the union and Ezeakiel Caldwell was employed by the union as its "front," agent or representative in that the union itself could not ask any relief directly of the National Labor Relations Board. The fact that Ezeakiel Caldwell went to the union and that Fred C. DeLoach, the representative for the United Construction Workers, affiliated with United Mine Workers, took Ezeakiel Caldwell to New Orleans and used him to do what neither the union nor its officials could do is ignored by the Court of Appeals for the Fifth Circuit in its decision under date of January 31st, 1952. No mention is made of these facts in the Court's decision. They are glossed over and ignored entirely.

In the Alside case, it is stated:

> "It is true that employees acting individually may assert their rights before the Board without the restrictions of Sec. 9(h). N.L.R.B. v. Augusta Chemical Co., 5 Cir., 187 F. 2d 63; N.L.R.B. v. Clausen, 3 Cir., 188 F. 2d 439, 443. But the case here goes beyond this. The charges filed by Worley are not limited to his individual grievances. They are in substance that 'on or about September 17, 1948, it' (respondent) 'by its officers, agents and representatives, terminated the employment of the persons listed on attached sheet, because of their membership and activities in behalf of United Steel Workers of America, C.I.O., *a labor organization* * * *' (italics ours) and with the charges, original and amended, are listed the names of the thirty and thirty-one Union employees, respectively. These lists include Worley's name. This quoted excerpt indicates for whom he was sponsor, even though he designated himself 'as an individual.' The basis of the charges were exactly the same as they would have been if they had been made by the Union and signed by Worley as its President. The purpose was to inform the Board that 'by the act set forth in the paragraph above and by other acts and conduct it' (respondent) 'has interfered with, restrained and coerced and is in-

terfering with, restraining and coercing its employees in the exercise of their rights granted in Sec. 7 of the said Act.'

"When the question of representation was raised before the Examiner the Board's counsel took the position that in filing the charges Worley was acting not only for himself but for all the other Union men. The Examiner accepted this view and thereupon counsel for respondent moved to dismiss, for the reason that the complaint had been issued contrary to Sec. 9(h) of the Act, that for all practical purposes 'Union men' meant the organization. The Examiner denied the motion and his action was sustained by the Board.

"Thus, is presented a question of fact which, if unsupported by substantial evidence on the record *considered as a whole,* is inconclusive. The relationship of Worley to the Union may be determined by circumstances just like other facts may be determined. He became a member of the Local Union on September 9, 1948. He immediately identified himself with Union activities and on September 15th he was elected President of Local 4154. Steel Workers' International representatives Lee, Katchur and Kendrick were at this meeting. On the next morning, Worley, Wolonski, Stemple and Forward, all local officers of the Union, accompanied the International representatives to President Kaufman's office. Kaufman conferred with the International representatives but declined to meet with Worley, Wolonski, Stemple and Forward upon the ground that they were no longer employees. At this conference the representatives sought to procure recognition of the Union. They failed and the employees were discharged.

"On the afternoon of the same day, Worley presided over a meeting of the Local, at which a picket line was established on a twenty-four hour daily schedule and he as President supervised the activities of the pickets

until they were discontinued some time in October. On the same day that Worley filed his original charge, Katchur, one of the International representatives of the Union, at Worley's request wrote to Kaufman and requested respondent to recognize the Union as the sole and exclusive bargaining agent for all production and maintenance employees. The letter set out the names of twenty-eight employees who had been locked out or discharged and among these was the name of Worley.

"Considering the question as a whole, it stretches credulity to the breaking point to believe that Worley did not on October 20, 1948, file the charges as a representative of the Union, when, before, after and even on that day, he was its chief, active protagonist. His signature, followed by the descriptive words, 'an individual,' does not destroy the evidential facts, most of which Worley himself admits. Our conclusion is that when Worley filed the charges he was acting as a 'front' or 'agency' of the Union. We think that the record as a whole does not support the Board's conclusion. We believe the contrary."

National Labor Relations Board vs. Alside, Inc., 192 Fed. Rep. (2d) 678 (679-680).

The quoted portion of the decision in National Labor Relations Board vs. Alside, Inc., 192 Fed. (2d) 678, has been set out in the Statement of the Case in order that we may bring to the attention of the Court the conflict with the decision in Southern Furniture Manufacturing Company vs. National Labor Relations Board decided by the United States Court of Appeals for the Fifth Circuit on January 31st, 1952.

While it is true the decision of the Judges of the Fifth Circuit in the Southern Furniture Manufacturing Company case states:

"Caldwell filed the charges on behalf of himself individually, as well as the other similarly discharged

> employees, including his sister, daughter, daughter-in-law, and a number of others. The only contact which Caldwell and the other employees had had with the union prior to their discharge was the signing of application cards on or about the day of their discharge. There was no substantial evidence that in filing the charges Caldwell was actually 'fronting' for the union. Cf. N.L.R.B. vs. Alside, Inc., supra. Under such circumstances the Board properly denied the Company's motion to strike from the complaint the names of all dischargees other than Ezeakiel Caldwell."

These quotations are given to emphasize the conflict in the decisions.

ERRORS RELIED UPON

The United States Court of Appeals erred in holding that Ezeakiel Caldwell did not serve as the agent, representative or "front" of the disqualified union which could not have brought any charge against Southern Furniture Manufacturing Company itself, and that there is no substantial evidence in the Record that in filing the charges Caldwell was actually fronting for the union.

The Court further erred in declining to consider the argument that the action of Ezeakiel Caldwell in serving as agent, representative or "front" for the union nullifies the provisions of the National Labor Relations Act to the effect that no petition brought under the terms of the National Labor Relations Act shall be entertained and no complaint shall be issued pursuant to a charge made by a labor organization "unless there is on file with the Board an affidavit executed . . . by each officer of such labor organizaiton and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party, etc."

ARGUMENT

We respectfully submit the quotations from the two decisions show a conflict in a matter involving an important question of Federal law which has not been but should be settled by this Court. In the Alside case the Judges of the Sixth Circuit concluded that it stretches credulity to the breaking point to believe that Worley did not file charges as a representative of the union and that his signature, followed by the descriptive words "an individual" does not destroy the evidential facts. The Court concluded that when Worley filed the charges he was acting as a "front" or agency of the union. The Court said, "We think that the record as a whole does not support the Board's conclusion. We believe the contrary."

In the Alside case the Court stated that the relationship of Worley to the union might be determined by circumstances just like other facts are determined. The Court said:

> "He became a member of the local union on September 9th, 1948. He immediately identified himself with union activities, and on September 15th he was elected President of Local 4154."

In the instant case Ezeakiel Caldwell became a member of the union known as United Construction Workers, affiliated with United Mine Workers, with headquarters at 352 St. Francis Street. His subsequent actions and negotiations with Mr. DeLoach, who described himself as a representative for the United Construction Workers, affiliated with United Mine Workers (Transcript of the Record, Appendix to Brief for Petitioner, Page 2), show that he served as the "front" for the union in the attack made on Southern Furniture Manufacturing Company.

We respectfully submit that Ezeakiel Caldwell, the Charging Party, signed the charge at the instigation of the union,—a union which had failed to qualify in accord-

ance with the terms of the National Labor Relations Act. His purpose in naming the other employees was to further the interest of the union. Surely, naming them could not further his own individual interest. There is no evidence in the Record to show that he was authorized by any of the persons named in the Charge to represent them in presenting the Charge. There is definite evidence in the Record to show that some of the persons named in the Charge had given him no authorization to present their names to the National Labor Relations Board, and, indeed, there is evidence to show that these people knew nothing whatever about the proceeding. (Transcript of the Record, Appendix to Petitioner's Brief, Testimony of Betty H. Frieson, Page 128; Testimony of Leona Steele, Pages 128-129).

A serious situation is created if in a non-union plant an employee, following his discharge, may find a union which will accept his application for membership and adopt him as its tool and take him before the National Labor Relations Board, where he is given recognition on the strength of his unsupported statement that he had been discharged by reason of union activity. Ezeakiel Caldwell had manifested no interest in the union prior to his discharge, and the Petitioner, Southern Furniture Manufacturing Company, had no way of knowing he had received an application blank for membership in a union. The application card had not been signed by Caldwell when he was discharged. It was after his discharge that he went to the union and lent himself to the union as its "front" or agent to serve the union in its activities in presenting charges to the National Labor Relations Board and in seeing to it that the Board issued a complaint against the Furniture Company.

The National Labor Relations Act, as amended, provides that "no complaint shall be issued pursuant to a charge made by a labor organization under Sub-section (b) of Section 10 unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit, shall have filed the requisite reports and unless its officers have filed

the required non-communist affidavits. (Section 9 (f) (h), National Labor Relations Act, as amended). (The same law is set out in the Cumulative Annual Pocket Part of the United States Code Annotated, Title 29, Section 159 (f) (h)).

If an individual may file charges with the National Labor Relations Board without showing his relationship to or representation of the other employees or former employees as to whom he may charge an unfair labor practice, the entire purpose of the act relative to the necessity of the labor organization complying with the law is done away with.

There is no substantial evidence in the Record which would show that Ezeakiel Caldwell had the authority to represent the other persons named in the charges filed with the National Labor Relations Board over his signature.

The facts of this case show that Ezeakiel Caldwell lent himself to the union. The relationship of Ezeakiel Caldwell to the union may be determined by circumstances just like other facts may be determined.

If the practice followed by the union in this case is permitted to continue without correction the requirements of the law relative to the report to be made to the Secretary of Labor of the financial structure of the union, its manner of doing business, the manner in which the officers and agents are elected or appointed, initiation fees, the names of the officers or agents whose aggregate compensation and allowances for any preceding year exceeded $5,000.00, and the provision that no investigation shall be made by the Board unless there is filed with the Secretary of Labor a report and affidavit showing that the officers of the labor organization are not members of the Communist Party or affiliated with such party, and that they do not believe in and are not members of or supporters of any organization which believes in or teaches the overthrow of the United States Government by force or by illegal or unconstitutional methods, are rendered meaningless and ineffective.

There is only one door by which persons are supposed to enter within the protecting fold of the National Labor Relations Act. That door was constructed by the Congress of the United States with the intent and purpose of permitting it to remain open to labor organizations which had qualified for entering in accordance with the requirements of the Act. The door was designed to remain shut against those who are unable to qualify or who elect to ignore its provisions. If the law means what it says unions who fail to qualify may not avail themselves of any benefits created by the Act.

The Congress believed that it had enacted a law not easily to be broken or disregarded by recalcitrant unions or union officers who are unwilling to sign statements that they do not believe in or teach the over-throw of the United States Government by force or by illegal or unconstitutional methods.

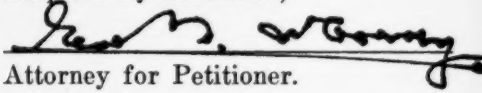
The instant petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit presents an important question the answer to which has great bearing on whether or not the Congress actually accomplished what it set out to do.

Until this important question of Federal law has been settled by this Court it will be possible for anyone, for any corporation to evade the law so easily and readily as to make of this evasion the equivalent of repeal. So long as Ezeakiel Caldwell (or any individual chosen to front for a union) may lend his name as agent or "front" to the union his name becomes a magical "Open Sesame" of evasion. The name of Ezeakiel Caldwell (or others like him) is a key which unlocks the door the Congress said must remain shut against the disqualified unions,—the unions whose officers are unwilling to say they do not believe in or teach the overthrow of the United States Government by force or by illegal or unconstitutional methods.

It is clear that Ezeakiel Caldwell went to the union,—not to the Board,—for succor, and it is equally clear that

the union used him as its tool or key to break down or unlock the door which the Congress had thought it had shut against such unions. And after this fashion the union has repealed the law without resort to legislative action.

Respectfully submitted,



Attorney for Petitioner.

C. M. A. Rogers and
McCorvey, Turner, Rogers, Johnstone & Adams
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 691

SOUTHERN FURNITURE MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 167-173) is reported at 194 F. 2d 59. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 102-157) are reported in 91 NLRB 1159.

JURISDICTION

The opinion of the court below was entered on January 31, 1952 (R. 167-173), and a petition for rehearing was denied on March 4, 1952 (R. 178). The petition for a writ of certiorari was filed on April 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, 141 *et seq.*), are set forth in the Appendix, *infra,* pp. 9-13.

QUESTION PRESENTED

Whether an employee who filed a charge with the National Labor Relations Board, claiming that he and other similarly situated employees had been discriminatorily discharged, was acting as an agent of a union, which was not itself qualified to file a charge, or whether he was acting in his capacity as an individual.

STATEMENT

On October 19, 1949, following his discriminatory discharge on October 7, Ezeakiel Caldwell filed a charge with the Board (R. 45-48), which he later amended (R. 51-55), complaining of the discrimination which he and other workers had

suffered "because of their membership and activities on behalf of District 50, United Construction Workers of America, United Mine Workers" (R. 46). This union had not complied with the filing requirements of Section 9 (f), (g) and (h) of the Act, but Caldwell signed and filed the charge as an individual (R. 47, 53). Based on the charge filed by Caldwell as "an individual" (R. 55), the Board entertained the complaint issued by its General Counsel, rejecting petitioner's contention that the complaint should be stricken as to all employees except Caldwell (R 116).

The court below sustained the Board in its holding that the facilities of the Board had been properly invoked by the charge which Caldwell filed as an individual. The court reasoned that "employees acting individually may assert their rights before the Board without restriction" of the filing requirements of Section 9 (f), (g) and (h) (R. 169). The court observed (R. 169), as the evidence shows,[1] that "Here, Caldwell filed the charges on behalf of himself individually as well as the other similarly discharged employees, including his sister, daughter, daughter-in-law, and a number of others. The only contact which Caldwell and the other employees had had with the union prior to their discharge was the signing

[1] R. 47, 53, P.A. 96, 154, 156, 172-173, 178-179, 306, 346, 6-8, 11, 25-27, 38-39, 44-45, 58-59, 70, 78-79, 93-94, B.A. 34, 44.

of application cards on or about the day of their discharge." Petitioner introduced no evidence before the Board to substantiate its claim that Caldwell was acting as an agent of the non-complying union rather than as an individual. In its petition to this Court (p. 7), petitioner cites the testimony of Caldwell's daughter, elicited on her cross and redirect examination on an unrelated issue (P.A. 160-163), to the effect that a union representative drove Caldwell and several other discharged employees to the Board's regional office at New Orleans where they gave affidavits. The court below concluded that "There was no substantial evidence that in filing the charges Caldwell was actually 'fronting' for the union" (R. 169). It held, accordingly, that "Under such circumstances the Board properly denied the Company's motion to strike from the complaint the names of all dischargees other than Ezeakiel Caldwell" (R. 169).

ARGUMENT

Every Court of Appeals which has considered the question, including the Court of Appeals for the Sixth Circuit with whose decision petitioner claims a conflict (*National Labor Relations Board* v. *Alside, Inc.*, 192 F. 2d 678, 679), has held that Section 9 (f), (g) and (h) of the Act does not restrict the right of an employee acting as an individual to invoke the aid of the Board against

unfair labor practices. *National Labor Relations Board* v. *Augusta Chemical Co.*, 187 F. 2d 63 (C.A. 5); *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443-444 (C.A. 3), certiorari denied, 342 U.S. 868; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 749, n. 1 (C.A. 9). Since a charge may be filed by any person (*National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U.S. 9, 17-18), and since the limitations of Section 9 (f), (g) and (h) are specifically confined to labor organizations, it is manifest that Congress contemplated continued access to the processes of the Board by individual employees without regard to the compliance status of their unions.

Thus, even assuming that when a discriminatorily discharged employee himself files a charge, an issue may nevertheless be raised whether he is acting as agent of a non-complying union, that issue would present only a question of fact. Accordingly, the only question which remains in this case is whether the court below correctly concluded that petitioner's contention that Caldwell was in fact acting as an agent of the non-complying union and not in his individual capacity was baseless. This factual question warrants no review. Moreover, the court below properly resolved the issue against petitioner. Himself the victim of discrimination, Caldwell filed a charge on his own behalf, for his close

relatives, and for his fellow-workers who were in the same predicament as he.[2] Except on the assumption that a person acts as an individual only if he is devoted exclusively to his own isolated interest, Caldwell's joining of others in his charge, natural in the circumstances, permits no inference that he thereby became the union's agent. This is particularly true since Caldwell was neither an officer of the union nor active in its affairs, his connection with it being limited to his signing a union application card immediately before his discharge. It is also immaterial that after his discharge a union representative drove Caldwell and several others to the Board's regional office at New Orleans where they gave affidavits to support their claim of discrimination. It is to be expected that employees may well be assisted by their unions in bringing charges before the Board. Such assistance, and any incidental benefit which a non-complying union may obtain through redress of the wrong done the employees, was undoubtedly anticipated by Congress when it left open an avenue of recourse to the Board by individual employees. To Congress, the dominant purpose of preserving a means of safeguarding employees from reprisal undoubtedly outweighed

---

[2] Petitioner implies (Pet. pp. 13, 14), that Caldwell was not qualified to name other discriminatees in his charge since it was not shown that they had authorized him to act on their behalf. But the Act permits any one to file charges (*Indiana & Mich.* case, *supra*, p. 5), and contains no requirement that a person discriminated against must authorize the filing of a charge on his behalf.

any benefits a non-complying union might get as a consequence. See *National Labor Relations Board* v. *Augusta Chemical Co.,* 187 F. 2d 63, 64 (C.A. 5).

There is no conflict between the decision below and that of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Alside, Inc.,* 192 F. 2d 678. Both decisions subscribe to the basic premise that employees as individuals may have recourse to the Board even if their union is not in compliance, but with respect to different fact situations, merely arrive at different conclusions concerning the import of the evidence. The court below carefully pointed out the differentiating factors in the evidence in the two cases (R. 168-169). In addition, more recently, in a case which the court below believed "presented a like factual situation" to *Alside,* it followed *Alside. National Labor Relations Board* v. *Happ Brothers Company, Inc.,* 29 LRRM 2698 (C.A. 5, April 15, 1952). Accordingly, the claim of conflict is without substance.

Finally, the question presented in this case is substantially similar to that which this Court recently declined to review in *National Labor Relations Board* v. *Clausen,* 342 U.S. 868. See the Board's brief in opposition to certiorari, pp. 2, 21-23. See also pages 13-14 of the Board's brief in opposition to certiorari in *Olin Industries, Inc.* v. *National Labor Relations Board,* No. 586, this Term, certiorari denied, April 7, 1952.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,
Attorney,
National Labor Relations Board.

MAY 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, Secs. 141 *et seq.*) are as follows:

* * * * * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * * * *

Representatives and Elections

Sec. 9.

* * * * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made

by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of

this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

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